United States Circuit Court of Appeals

APPELLANT'S OPENING BRIEF.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

STATUTES.

TEXTBOOKS.

No. 11205

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

VIOLA JUANITA HATCHITT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

JUANA SATURNINO HATCHITT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPELLANTS' OPENING BRIEF.

I.

Jurisdictional Statement.

Two appeals are involved herein. These two appeals are from summary judgments rendered in favor of the defendant and against the respective plaintiffs in two actions entitled, *"Viola Juanita Hatchitt v. United States of America,"* No. 4235 O'C Civil, and *"Juana Saturnino Hatchitt v. United States of America,"* No. 4236 O'C Civil, in the District Court of the United States for the

Southern District of California, Central Division. [Tr. pp. 45-47, 50-51, 52-53.] These two appeals have been consolidated by stipulation of the parties [Tr. pp. 57-58] and by order of the Court [Tr. pp. 58-59] because the same relief was sought in each of the above-mentioned actions which were tried together and submitted on the same evidence in the court below. [Tr. p. 57.]

Each of the appellants is a duly enrolled and recognized member of the Palm Springs or Agua Caliente Band of Mission Indians of California. [Tr. pp. 3, 10.] In each of the above entitled actions the plaintiff therein sought a judgment adjudging and decreeing: (a) that she is a duly enrolled and recognized member of the Palm Springs Band of Mission Indians of California; and (b) that on June 21, 1923, the United States of America allotted certain lands to each of said plaintiffs, as described in their respective complaints, and that each plaintiff is entitled to an allotment trust patent to the lands described in her complaint from the United States of America. Appellants also prayed for other and general relief.

The District Court had jurisdiction to grant the relief prayed for under Section 345 of Title 25, U. S. C. A. (31 Stat. 760) which, in so far as pertinent, provides as follows:

> "All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any

Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States: and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands held August 15, 1894, by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: Provided, That the right of appeal shall be allowed to either party as in other cases."

This Court has jurisdiction under Section 128 of the Judicial Code (28 U. S. C. A., Section 225) and under Section 345 of Title 25, U. S. C. A., *supra*.

The pleadings necessary to show the existence of the jurisdictions are the complaint [Tr. pp. 2-9] and the answer thereto [Tr. pp. 10-35].

The District Court rendered one opinion, designated "Order of Court Granting Motion of The Government . . . For a Summary Judgment" applying to both of said cases [Tr. pp. 40-45] and judgment in each of said cases [Tr. pp. 45-47, 50-51, 52-53].

II.

Statement of the Case.

(The two complaints will be hereinafter referred to as "the complaint," and the two judgments as "the judgment.")

The Complaint.

Appellants' complaint, briefly summarized, alleges:

1. That appellants are citizens of the United States and of the State of California, are of Indian blood and descent, and are duly enrolled and recognized members of the Palm Springs Band of Mission Indians of California.

2. That the Secretary of the Interior, acting under authority of certain Acts of Congress did, on or about June 7, 1921, conclude that the Mission Indians of California were sufficiently advanced in civilization to be capable of owning and managing land in severalty; that shortly thereafter the Secretary appointed H. E. Wadsworth as Allotting Agent at Large for the Mission Indian Reservations of California with authority to make allotments of lands in severalty to the Mission Indians; and that, pursuant to the authority granted him, said Allotting Agent surveyed and classified, or caused to be surveyed and classified, the lands of the Palm Springs Reservation of Mission Indians of California in order that allotments in severalty should be made by him to the members of said Band in accordance with the Statutes of the United States.

3. That on June 21, 1923, the said Allotting Agent allotted to appellants the lands described in the complaint, and thereafter issued and delivered to them certificates of allotment to said lands under which appellants became

entitled to allotment trust patents and to the sole and exclusive possession of said lands.

4. That on October 26, 1923, said Allotting Agent, acting by authority of the Secretary of the Interior, stated and represented to appellants that the issuance and delivery of said certificates of allotment entitled them to enter upon and take possession of the lands so allotted, and that said certificates would be evidence of their right to possess, hold and improve said lands pending the issuance of trust patents thereto to appellants, and that believing and relying upon said certificates, statements and representations appellants improved said lands by erecting thereon permanent buildings and structures suitable for residential and business purposes in excess of $25,000 by each of the appellants, and that they would not have made said improvements but for the conduct, statements and representations of the Secretary of the Interior and said Allotting Agent.

5. That in 1927 the Secretary of the Interior attempted to withdraw the allotments made in 1923, directed the Allotting Agent to make reallotments, and the lands previously allotted to appellants in 1923 were reallotted to them in 1927, and similar certificates of allotment were issued by the Allotting Agent and delivered to appellants.

6. That as the result of the acts and conduct of the Secretary of the Interior and the Allotting Agent appellants became and at all times after June 21, 1923, were and are the equitable owners of the lands so allotted and the improvements placed thereon and entitled to allotment trust patents thereto.

7. That by reason of the Acts of Congress and the foregoing acts, conduct, etc., it became, was and is the

mandatory duty of the Secretary of the Interior at all times since June 21, 1923, to issue to appellants allotment trust patents to the lands allotted to them.

8. That by reason of the Acts of Congress and the acts, conduct, proceedings, statements and representations of the Secretary of the Interior and of said Allotting Agent the United States is estopped to question or deny appellants' equitable title to said lands or their right to allotment trust patents thereto or their right to the exclusive possession, use and enjoyment thereof. [Tr. pp. 2-9.] And appellants prayed for the relief hereinabove mentioned and set forth.

The Answer.

The United States filed an answer to the complaint, consisting of three designated "Defenses." The First Defense is an answer to the allegations of the complaint, some of which are admitted and others denied. The Second Defense is largely an historical and detailed statement concerning the appointment of H. E. Wadsworth as Allotting Agent for the Mission Indian Reservations of California and of what was done by him and the Secretary of the Interior in respect to the allotments made by said Allotting Agent in 1923 and the reallotments made in 1927, and said Second Defense closed with the statement that on December 14, 1944, the Secretary of the Interior disapproved the Schedule prepared and filed by said Allotting Agent in the year 1927. In view of the fact that the judgment of the District Court is based entirely upon the Third Defense of the Answer, it is unnecessary to elaborate upon the First and Second Defenses set up in the Answer.

In its Third Defense the United States pleaded, as a bar to appellants' respective actions, the judgment and decree of the District Court of the United States for the Southern District of California, Central Division, in the case of *Viola J. Hatchitt v. United States of America,* No. Eq. 1209-M (later numbered Eq. 1209-Y), which was consolidated for the trial in an action of similar nature entitled *Genevieve F. St. Marie v. United States of America,* No. Eq. 918-Y, and sixteen other actions similar in character, all of which cases are commonly known as the *St. Marie Cases.* (See *St. Marie v. United States,* 24 F. Supp. 237, affirmed 108 F. (2d) 876, certiorari denied by Supreme Court because petition therefor filed out of time, 311 U. S. 652.) The United States pleaded in said Third Defense that the judgments in the *St. Marie* and consolidated cases, including those of appellants, have become final, binding and conclusive upon the parties to the present actions and the subject matter thereof and are *res judicata* as to all matters alleged in the complaint. [Tr. pp. 18-35.]

Immediately upon filing its answer the United States filed "Notice and Motion for Summary Judgment" that appellants' complaints be dismissed on the ground that the parties to this action are bound and concluded as to the subject matter thereof by the judgment and decree in the above mentioned and titled former actions. [Tr. pp. 36-38.] Appellants thereupon filed their "Opposition to Motion for Summary Judgment" [Tr. pp. 38-40], following which the trial court heard said motion and opposition thereto and thereupon made and filed its Order granting motion of the Government for summary judgment [Tr. pp. 40-45], and thereafter made and entered its judgment accordingly. [Tr. pp. 45-46, 50-51, 52-53.]

III.

Holding of the Court.

The judgment of the Court below, in so far as pertinent, is as follows:

> "It appearing to the Court that all issues raised by the complaint herein have been heretofore determined adversely to the plaintiff by the decree of this Court in the case of Viola J. Hatchitt, minor, by Juana S. Hatchitt, *prochein ami,* v. United States of America, No. 1209-Y Eq., which decree was affirmed by the Circuit Court of Appeals in and for the Ninth Circuit in the case of St. Marie v. United States of America, reported in 108 F. 2d 876, certiorari denied 311 U. S. 652, petition filed out of time; and
>
> "It further appearing that the decree in action No. 1209-Y Eq. became and is a final judgment and is binding and conclusive and *res judicata* as to all matters of law and fact raised by the complaint herein;
>
> "It Is Ordered, Adjudged and Decreed that the motion of defendant for summary judgment of dismissal be granted and the plaintiff take nothing by her complaint on file herein."

IV.

Judgment in the Former Case Pleaded as Res Judicata in Present Case.

The judgment of the District Court in the former case, pleaded as *res judicata,* provides:

> "It Is Ordered, Adjudged and Decreed that the complainant take nothing by her action; and
>
> "It Is further Ordered that neither party recover costs of suit." [Tr. p. 35.]

Inasmuch as the former judgment does not disclose the issues, claims, and demands there involved, reference must be made to other parts of the record in that case in order to determine what was decided by the judgment therein.

In addition to the judgment, the record pleaded in the Answer herein consists of the "Bill of Complaint" [Tr. pp. 21-27] and the "Answer to Bill of Complaint" [Tr. pp. 28-34].

Said Bill of Complaint briefly summarized, alleged: that appellants were of Indian blood and descent and were duly enrolled and recognized members of the Palm Springs Band of Mission Indians of California; that pursuant to certain Acts of Congress the Secretary of the Interior, on June 7, 1931, concluded that the Mission Indians were so far advanced in civilization as to be capable of owning and managing lands in severalty; that thereafter said Secretary caused to be made allotments of land in severalty to such of said Indians, including appellants, as made selections of land, which the Secretary did thereafter allot or cause to be allotted to them by causing the same to be recorded upon the official schedule of allotment and by issuing to them certificates of allotment

to the lands so selected on May 9, 1927. [Tr. pp. 21-22.] The Bill of Complaint further alleged that, pursuant to Acts of Congress, the Secretary of the Interior, on June 7, 1921, appointed H. E. Wadsworth a Special United States Allotting Agent at Large for the Mission Indian Reservations of California, effective July 1, 1921, who accepted and qualified as such; that thereafter said Allotting Agent surveyed and classified, or caused to be surveyed and classified, the lands of the Palm Springs Reservation of the Mission Indians of California; and that thereafter on May 7, 1927, acting under the direction and authority of said Secretary and the Statutes of the United States, said Alloting Agent allotted the lands involved to appellants and that under and by virtue of such allotment the Allotting Agent issued a certificate to each of the complainants under which she became entitled to the sole use and benefit of the lands described therein; that appellant many times made requests upon proper agents of the United States for an allotment trust patent for the lands selected and described in the certificate to which she was entitled under designated Acts of Congress, but that such patent had not been issued; and that she has a vested right to said lands. The Bill of Complaint prayed, in so far as necessary to state here:

> "That it be adjudged, ordered and decreed by this Court:
>
> "(a) That the United States allotted to the complainant on May 9, 1927, for her sole use and benefit, the lands above described in this her bill of complaint.
>
> "(b) That the complainant is entitled to an Allotment Trust Patent to the said lands from the United States of America. . . ."

and for other and general relief. [Tr. pp. 26-27.]

The United States filed its answer to said Bill of Complaint, denying therein that, on May 9, 1927, or at any other time, the Secretary of the Interior or H. E. Wadsworth, Allotting Agent, or any other person, allotted to complainant the lands described in the complaint, and also denying that the Secretary or said Allotting Agent issued a certificate to complainant which entitled her to the use of said lands. The answer admitted: that H. E. Wadsworth was appointed as Allotting Agent for the Mission Indian Reservations and that he surveyed and classified the lands of the Palm Springs Mission Indian Reservation [Tr. p. 31]; that said Agent was authorized and directed to prepare a tentative allotment schedule for the Palm Springs Band of Mission Indians [Tr. p. 31]; that in 1923 said Agent prepared a tentative allotment schedule which the Secretary refused to approve; that in 1927 the Allotting Agent was directed by the Secretary to prepare another schedule for those members of said Palm Springs Band who desired allotments, that said schedule was prepared and certificates of selection were issued by the Allotting Agent; that the Secretary refused and refuses to approve said tentative allotments made in 1927, and refused and refuses to issue trust patents to the lands selected. [Tr. pp. 31, 32.]

It is apparent from the pleadings in the former case that the only issue there involved was appellants' right to allotment trust patents under the proceedings had and taken in 1927 and under the certificates issued by the Allotting Agent to appellants on May 9, 1927.

It is also apparent from said pleadings in the former case that appellants' right to allotment trust patents under the proceedings had and taken, and under the certificates issued by the Allotting Agent, in the year 1923 was

not there in issue and was not there involved or decided.

Inasmuch as appellants' right to allotment trust patents to the lands selected by and allotted to them is, in the present case, based upon the proceedings had and taken and upon the certificate issued by the Allotting Agent in 1923, it is obvious that the judgment in the former case is not *res judicata* as to the issues involved in the present case.

V.

Specification of Errors.

1. The District Court erred in holding that its judgments in the suits styled *Viola J. Hatchitt v. United States of America,* No. Eq. 1209-M (later numbered Eq. 1209-Y), and *Juana S. Hatchitt v. United States of America,* No. 1208-Y Eq., are *res judicata* as to all matters of law and fact raised by the complaints in the present cases.

2. The District Court erred in refusing to hold that the United States of America is estopped, because of the fiduciary relationship existing between it and appellants, to rely upon the doctrine of *res judicata* as a bar to the lawful claims and demands of appellants as alleged in their complaints herein.

3. The District Court erred in refusing to hold that the United States of America is estopped because of the Acts of Congress pleaded in appellants' complaints and because of the acts, conduct, proceedings, statements and representations of the Secretary of the Interior and of

the Special Allotting Agent of the United States likewise pleaded in said complaints, to question, or deny, appellants' equitable title to the lands described in said complaints, or their right to allotment trust patents thereto, or their right to the sole and exclusive possession, use and enjoyment thereof

VI.

Summary of Argument.

The former decision is not *res judicata* because different claims and demands are involved in the present cases.

The United States is estopped to plead and rely upon *res judicata* because of the fiduciary relationship existing between it and appellants.

The United States is estopped to question, or deny, appellants' equitable title to the lands allotted to appellants because of the Acts of Congress, and because of the acts, conduct, proceedings, statements and representations of the Secretary of the Interior and H. E. Wadsworth, Special Allotting Agent of the United States for the Mission Indians of California, as pleaded and set forth in Appellants' Complaints.

By the Act of March 2, 1917, the Congress abolished the right and discretion of the United States, its officers and agents, to deny, or withhold, allotment trust patents from appellants for the lands selected by and duly allotted to them in the year 1923

VII.
ARGUMENT.

POINT ONE.

The Former Decision Is Not Res Judicata Because Different Claims and Demands Are Involved in the Present Case.

It is settled by many decisions of the Supreme Court of the United States that if a different claim or demand is involved in the subsequent action, the decision in the former case is not *res judicata.* This principle has been illustrated in various decisions of that Court, some of which are noted below.

In *Larsen v. Northland Transp. Co.*, 292 U. S. 20, 54 S. Ct. 584, 78 L. Ed. 1096, the Supreme Court said, at p. 25 (292 U. S.):

> "The established rule in this Court is that if in a second action between the same parties, a claim or demand different from the one sued upon in the prior action is presented, then the judgment in the prior cause is an estoppel 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' Bates v. Bodie, 245 U. S. 520, 526, 38 S. Ct. 182, 184, 62 L. Ed. 444, L. R. A. 1918C, 355; United States v. Moser, 266 U. S. 236, 241, 45 S. Ct. 66, 69 L. Ed. 262; United Shoe Machinery Corp. v. United States, 258 U. S. 451, 458, 42 S. Ct. 363, 66 L. Ed. 708. '. . . A judgment is not conclusive of those matters as to which a party had the option to but did not in fact put in litigation in the action.' Freeman on Judgments (5th Ed.), Section 786."

The issue involved in the former cases was, in brief, appellants' right to allotment trust patents for the lands allotted to them by the proceedings had in the year 1927. Nothing more was, or could be, litigated in those cases. Through an incorrect interpretation of applicable Acts of Congress, the former decisions on that issue were against appellants.

The issue in the present cases is the right of appellants to allotment trust patents to the lands allotted to them by the proceedings had in the year 1923, and this issue was in no way involved in the former decision. This right was not litigated in the former cases, and the point is now open for decision. In this connection, see *Bates v. Bodie,* 245 U. S. 520, 38 S. Ct. 182, 62 L. Ed. 444; *United States v. Moser,* 266 U. S. 236, 45 S. Ct. 66, 69 L. Ed. 262; *Southern Pac. Ry. Co. v. United States,* 168 U. S. 1, 18 S. Ct. 18, 27, 42 L. Ed. 355; *Eller v. Paul Revere Life Ins. Co.,* 135 F. (2d) 403, 405; *Cromwell v. Sac. County,* 94 U. S. 351, 354, 24 L. Ed. 195, 198; *Steam Packet Co. v. Sickles,* 24 Howard 333, 16 L. Ed. 650; *Baltimore S. S. Co. v. Phillips,* 274 U. S. 316, 319, 47 S. Ct. 600, 602, 71 L. Ed. 1069.

In *Baltimore S. S. Co. v. Phillips,* 274 U. S. 316, *supra,* the Court said at page 319:

> "But if the second case be upon a different cause of action, *the prior judgment or decree operates as an estoppel only as to matters actually in issue or points controverted,* upon the determination of which the judgment or decree was rendered. (Citing cases.)" (Italics ours.)

In other words, the estoppel of a judgment cannot extend beyond the point actually litigated and determined in

the former action. It was so decided in *Cromwell v. Sac. County,* 94 U. S. 351, 354, 24 L. Ed. 195, 198, *supra,* where, after review of some English and American cases and some of its own decisions upon *res judicata,* the Supreme Court said:

> *"These cases,* usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, *negative the proposition that the estoppel can extend beyond the point actually litigated and determined."* (Italics ours.)

The rule in California is in accord with the rule stated in the above cited cases. The California courts recognize the exceptions to the general rule, and the case at bar falls within the exceptions. In *Title Guarantee & Trust Co. v. Monson,* 11 Cal. (2d) 621, the Supreme Court said, at pp. 631, 632:

> "Nor is the rule applicable to rights, claims or demands, although growing out of the same subject matter, but which constitute separate or distinct causes of action, and which were not put in issue in the former action. (34 C. J. 818, 823.) (See, also, to the same effect: *Humiston, Keeling & Co. v. Bridgman,* 195 Mich. 82 (161 N. W. 852), *Townsley v. Niagara Life Ins. Co.,* 218 N. Y. 228 (112 N. E. 924), *Cook v. Conners,* 215 N. Y. 175 (109 N. E. 78, Ann. Cas. 1917A, 248, L. R. A. 1916A, 1074), *Beavans v. Groff,* 211 Ind. 85 (5 N. E. (2d) 514, 108 A. L. R. 694), *Eisenberg v. Thorne,* 49 Misc. 617 (96 N. Y. Supp. 1020), *Fourche River Lumber Co. v. Walker,* 96 Ark. 540 (132 S. W. 451), *Moore v. Snowball,* 98 Tex. 16, 24 (81 S. W. 5, 107 Am. St. Rep. 596, 66 L. R. A. 745), and

Paris v. Golden, 96 Kan. 668(153 Pac. 528, 529).) In the case of *Todhunter v. Smith,* 219 Cal. 690, 695 (28 Pac. 2d 916), it is said: 'The doctrine of *res judicata* has a double aspect. A former judgment operates as a bar against a second action upon the same cause, but in a later action upon a different claim or cause of action, it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.' "

In *U. S. Fidelity & Guaranty Co. v. McCarthy,* 33 F. (2d) 7 (cert. den. 280 U. S. 590) it was contended that a surgeon, whose hand was injured by the severing of a median nerve, was totally disabled from performing any work as a surgeon. He brought an action to recover benefits for a certain period. Later he sued to recover benefits for another period. In each case he was successful. In a third action for another and wholly different period, his motion for summary judgment was granted on the theory that his alleged total disability had been in issue and was established in the former actions and, hence, was *res judicata.* Upon appeal, the Circuit Court of Appeals reversed the judgment on the ground that judgments in the former cases were not conclusive as to total disability for a later period than the periods involved in the former actions.

It may be noted that many authorities hold that *actual identity* of parties and of causes of action is essential to the creation of an estoppel by a former judgment. (34 *Corpus Juris* 802, Section 1225, *et seq.,* and cases cited. See, also, Annotations, 65 *A. L. R.* 1113; 70 *A. L. R.* 1447; 88 *A. L. R.* 563.) Identity of causes of action is lacking in the case at bar.

It is also worthy of note that decisions on mere questions of law do not operate as *res judicata* when divorced from the subject matter to which the law was applied. (See 2 *Freeman on Judgments* (5th Ed.), Section 709; *United States v. Moser,* 266 U. S. 236, 45 S. Ct. 66, 69 L. Ed. 262; *Southern Pac. Co. v. Van Hoosear,* 72 F. (2d) 903, 906; *Blaffer v. Com'r of Int. Rev.,* 134 F. (2d) 389, and cases there cited.) The point is particularly pertinent in view of the erroneous construction placed upon the Act of March 2, 1917 (39 *Stat. L.* 976, 25 *U. S. C. A.,* Section 331) and other applicable Acts of Congress in the former decisions pleaded here as *res judicata.* (See *Arenas v. United States,* 322 U. S. 419, 64 S. Ct. 1090, 88 L. Ed. 1363.)

Illustrative of the point is the textual statement in 2 *Freeman of Judgments* (5th Ed.), Section 709, *supra,* as follows:

> "Decisions on mere questions of law do not operate as *res judicata* when divorced from the particular subject matter to which the law was applied, though they may be followed as precedents under the doctrine of *stare decisis.*"

In *United States v. Moser,* 266 U. S. 236, 45 S. Ct. 66, 69 L. Ed. 262, *supra,* the Supreme Court said:

> "The contention of the government seems to be that the doctrine of *res judicata* does not apply to questions of law; and, in a sense, that is true. It does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases."

Other cases on the point are: *Dennison v. United States,* 168 U. S. 241, 18 S. Ct. 57, 42 L. Ed. 453; *Irving Nat'l Bank v. Law,* 10 F. (2d) 721. See, also, *Von Moschzisker, Res Judicata,* 38 Yale L. J. 299, 302.

In view of the foregoing, the former decisions are not *res judicata* of the issues, claims and demands involved in the cases at bar.

POINT TWO.

The United States Is Estopped to Plead and Rely Upon Res Judicata Because of the Fiduciary Relationship Existing Between It and Appellants.

Under the authorities it is clear that the relationship between the United States of America and appellants is that of guardian and ward or trustee and beneficiary. (See, 42 *C. J. S.,* p. 672, Sec. 20; *United States v. Klamath and Moadoc Tribes,* 304 U. S. 119, 58 S. Ct. 799, 82 L. Ed. 1219; *Jaybrid Mining Co. v. Weir,* 271 U. S. 609, 46 S. Ct. 592, 70 L. Ed. 1112; *United States v. Ramsey,* 271 U. S. 467, 46 S. Ct. 559, 70 L. Ed. 1039; *United States v. Payne,* 264 U. S. 446, 44 S. Ct. 352, 68 L. Ed. 782; *Cramer v. United States,* 261 U. S. 219, 43 S. Ct. 342, 67 L. Ed. 622; *Board of Co. Comrs. v. Seber,* 130 F. (2d) 663, aff. 318 U. S. 705.) By the express provisions of the Mission Indian Act (Act of January 12, 1891, Ch. 65, 26 Stat. L. 712) the relationship of trustee and beneficiary between the United States and the Mission Indians of California was established. (See, *Arenas v. United States,* 320 U. S. 733, 64 S. Ct. 1145, 88 L. Ed. 1363.)

As a fiduciary the United States neither has, nor can have, a pecuniary interest in the lands of the Mission

Indians of California. Such interest as the Government has in said lands is only that of a trustee, and the duty of a trustee is the only duty it can exercise in reference to the trust property. (See, *Mission Indian Act, supra; United States v. Algoma Lbr. Co.,* 305 U. S. 415, 59 S. Ct. 217, 83 L. Ed. 260; *United States v. Forrest Lbr. Co.,* 305 U. S. 415, 59 S. Ct. 217, 83 L. Ed. 260; 42 *C. J. S.* 672, Sec. 20; *Jaybird Mining Co. v. Weir, supra; United States v. Ramsey, supra.*) It is not to be questioned here that the United States is charged with the same duties and obligations as are imposed by law upon other fiduciaries.

It is not only the duty of the United States not to assert any pecuniary claim against the rights of restricted Indians, but it is also its bounden duty to protect those rights (*Civil Code of California,* Section 2228; *Restatement of the Law of Trusts,* Section 170), and this duty extends to the bringing of suits necesary to protect such rights. (*Mashunkashey v. United States,* 131 F. (2d) 288, cert. den. 318 U. S. 764, 63 S. Ct. 665, 87 L. Ed. 1136; *United States v. Colvard,* 89 F. (2d) 312; *United States v. Nez Perce County,* 95 F. (2d) 232.) As was said in *Mashunkashey v. United States,* 131 F. (2d) 288, *supra,* at page 290:

> "Appellant challenges the right of the government to maintain this action. It is true, as asserted by appellant, that the declaratory judgment act creates no new rights. The right of the government to maintain this action must be found in the general law. The government brought this action in its own right and in its capacity as guardian of the restricted Indians. As guardian of such Indians, the govern-

> ment stands charged with all the obligations attending such a relationship. It not only has the power to institute actions to preserve the rights of its wards, Heckman v. United States, 224 U. S. 413, 32 S. Ct. 424, 56 L. Ed. 820; United States v. Minnesota, 270 U. S. 181, 46 S. Ct. 298, 70 L. Ed. 539; McCarty v. Hollis, 10 Cir., 120 F. (2d) 540, but it is its duty to do so when those rights are threatened."

Instead of contesting appellants' right to allotment trust patents to the lands allotted to them in 1923, it is the duty of the Government, inherent in its trusteeship, to so act that appellants may receive said trust patents under the 1923 allotment schedules. (*Act of March 2, 1917, 39 Stat. L. 969-976*, amending Mission Indian Act; *Arenas v. United States*, 320 U. S. 733, 64 S. Ct. 1145, 88 L. Ed. 1363; 42 *C. J. S. 672*, Sec. 20.) It clearly is not the duty of the Government, by the highly technical defense of *res judicata*, to attempt to defeat the lawful right of appellants to their allotment trust patents; and the Government's *bona fides* can best be shown by cooperating to secure this right under the law as construed by the Supreme Court of the United States in the *Arenas* case, *supra*.

The decisions of the District Court and of this Court in the former cases (*St. Marie v. United States* and companion cases, 24 F. Supp. 237, Aff. 108 F. (2d) 876) rested upon the incorrect assumption that the Secretary of the Interior had absolute discretion and power to refuse approval, or to affirmatively disapprove, the allotments made by the Special Allotting Agent of the United States to the members of the Palm Springs Band of Mission Indians. The Supreme Court reached a differ-

ent conclusion in the *Arenas* case (320 U. S. 733, 64 S. Ct. 1145, 88 L. Ed. 1363) where it said, at pp. 425, 426 (320 U. S.):

> "The Act of 1891 provides that 'whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, *in the opinion of the Secretary of the Interior,* be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians.' (Emphasis supplied.) This undoubtedly conferred a very considerable discretion upon the Secretary.
>
> "The Act of 1917, however, drops the language of discretion and *directs* the Secretary to cause allotments to be made to the Indians on the Mission Reservations. The Act was prepared by the Secretary and if it was intended to perpetuate his discretion as to whether the allotment policy was to be applied to these Indians at all, it might easily have so provided. Both the Secretary and Congress appear to have settled that point."

And, commenting further upon the mandatory provisions of the Act of 1917, the Court said, at p. 427 (*Id.*):

> "To assume that the Act of 1917, while directing the Secretary to make allotments, only meant to give him uncontrolled discretion not to do so would be a doubtful construction, in view of its history. But even if it were so interpreted, it did not require the Secretary to manifest his exercise of discretion in any formal way. His opinion that the Indians had the capacity for individual responsibility for land ownership could be indicated by conduct as well as by words. We think his conduct and words amount both to an administrative construction of the 1917 Act as a direction and to the exercise of any discretion he may have had under it."

It cannot be doubted that the Supreme Court was of the opinion that the Act of 1917 abolished the discretion of the Secretary of the Interior, and directed him by legislative mandate to make allotments to these Indians, and that the Congress, by said Act, found that they were sufficiently advanced in civilization as to be capable of owning and managing lands in severalty, for the Court said in respect thereto:

> "History and common knowledge of these Indians would indicate that they are not wanting in whatever it is that makes up 'civilization' . . . By the standards of peacefulness, industry, and gentleness these Indians have long been 'civilized.'" (*Id.*, pp. 427, 428.)

Nor, under the facts shown by this record, are appellants inhibited from asserting that the United States is estopped to plead and rely upon *res judicata*. It is, of course, true that the United States is not to be estopped when acting in the capacity of a sovereign; but it is also true that when acting in a proprietary capacity the doctrine of estoppel may be applied to it. (31 *C. J. S.* 403, *et seq.*, Section 140; 21 *C. J.* 1186-1888; *The Falcon*, 19 F. (2d) 1009; *Dayton Airplane Co. v. United States*, 21 F. (2d) 673.) In this connection, it should be noted that the decisions of the Supreme Court in *Utah Power & Lowe Co. v. United States*, 243 U. S. 389, 37 S. Ct. 387, 61 L. Ed. 791, and *Yuma County Water Users' Ass'n v. Schlecht*, 261 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909, are not applicable to the cases at bar. The rule stated in those cases is that the United States cannot be estopped by the *unauthorized* acts, agreements and statements of its agents. But the rule is different when, as here, the

agents of the Government not only had authority but had been given a mandate by Congress to perform the acts and make the statements and representations alleged in the complaints.

In view of the foregoing considerations and authorities, appellants submit that the United States is estopped as a fiduciary to plead and rely upon *res judicata* as a bar to the relief sought by appellants in these actions.

POINT THREE.

The United States Is Estopped to Question or Deny, Appellants' Equitable Title and Right to Allotment Trust Patents to the Lands Allotted to Them in 1923 Because of the Acts of Congress, and Because of the Acts, Conduct, Proceedings, Statements and Representations of the Secretary of the Interior and of the Special Allotting Agent of the United States, as Pleaded and Set Forth in Appellants' Complaints.

The doctrine of equitable estoppel is applicable to the United States under the Acts of Congress and the facts pleaded in appellants' complaints. It is unnecessary to restate these in detail. The following will serve to establish equitable estoppel.

On June 21, 1923, the Allotting Agent, lawfully appointed and empowered by the Secretary of the Interior to survey, classify and allot lands to the Mission Indians of California, and who had fully performed those duties, issued and delivered certificates of allotment to appellants for the lands described in their complaints. Shortly thereafter and in 1923, the Allotting Agent, upon the authority of the Secretary, put appellants in possession of said lands. On or about October 26, 1923, said Al-

lotting Agent stated and represented to appellants that the certificates issued and delivered to them entitled them to the possession and use of said lands and that said certificates would be evidence of their right to allotment trust patents thereto and of their right to possess and improve the same. Thereafter, believing and relying upon said certificates and said acts, statements and representations of said Allotting Agent, appellants made costly improvements upon said lands consisting of buildings for residential and business purposes in the approximate amount of $50,000.00 which they would not have made otherwise. Appellants at all times since 1923 have been in the full and complete possession, use and enjoyment of said lands and the improvements made thereon with the knowledge and consent of the United States. Under these facts it would be a constructive fraud upon appellants to deny their equitable right and title to said lands and their right to allotment trust patents thereto

An excellent statement of the rule here applicable is made in *United States v. Standard Oil Company of California,* 20 F. Supp. 427, at page 452, as follows:

> ". . . the doctrine of estoppel may be asserted successfully against it (the United States) when it or its agents have been guilty of acts which amount to fraud and which were acted on in good faith by others to their detriment. 21 C. J. 1186 *et seq.;* United States v. Stinson (C. C. A. 7, 1903), 125 F. 907; *Id.* (1905), 197 U. S. 200, 25 S. Ct. 426, 49 L. Ed. 724; State of Iowa v. Carr (C. C. A. 8, 1911), 191 F. 257. And see Pan-American Petroleum & Transport Co. v. United States (1927), 273 U. S. 456, 506, 47 S. Ct. 416, 424, 71 L. Ed. 734."

It cannot be doubted that appellants, in good faith and to their detriment, acted upon the acts, proceedings, conduct, statements and representations of the Allotting Agent and of the Secretary of the Interior in entering into the possession of, and in making costly improvements upon, the lands allotted to them.

Equitable estoppel is defined in 31 *C. J. S.* 236, Section 59, as follows:

> "Equitable estoppel or estoppel by misrepresentation is the effect of the voluntary conduct of a person whereby he is precluded, both at law and in equity, from asserting rights against another person relying on such conduct; and it arises where a person, by his acts, representations, or admissions, or even by his silence when it is his duty to speak, intentionally or through culpable negligence induces another to believe that certain facts exist, and the other person rightfully relies and acts on such belief, and will be prejudiced if the former is permitted to deny the existence of such facts."

This definition is in accord with the rule in California thus stated in 10 Cal. Jur. 626, Section 14:

> "The whole office of an equitable estoppel is to protect one from a loss which, but for the estoppel, he could not escape. The vital principle of equitable estoppel, it has been said, is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position involves fraud and falsehood, and the law abhors both. In general, four things are essential to the application of the doctrine of equitable estoppel: first, the party to be estopped must be apprised

of the facts; second, he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; third, the other party must be ignorant of the true state of facts; and fourth, he must rely upon the conduct to his injury."

Many California cases are cited to support the text, *supra*.

The cases at bar fall squarely within the rule thus announced, and since there is no reason why the United States, as a fiduciary, may not be estopped by its acts and conduct, or by the acts and conduct of its agents (Point Two, *ante*), we submit that it is estopped to question, or deny, appellants' equitable title and right to allotment trust patents to the lands allotted to them in 1923.

Conclusion.

Wherefore, appellants pray that the judgments herein be reversed and that these causes be remanded to the District Court for trial on the issues made by the complaints and answers of the parties, respectively.

Respectfully submitted,

JOHN W. PRESTON,
OLIVER O. CLARK,
DAVID D. SALLEE,
ROBERT A. SMITH,
By JOHN W. PRESTON,
Attorneys for Appellants.